

Outrage upon the Personal Dignity of the Dead in International and Swedish War Crimes Legislation and Case Law

Anna Andersson*

1	Swedish Cases Involving Outrages upon the Personal Dignity of the Dead	247
2	Swedish Legislation on War Crimes	249
	2.1 The Old Provision in the Criminal Code.....	250
	2.2 The New Provision in the Specialized Act of 2014	253
3	Are Dead Persons Protected by the War Crime of Committing Outrages upon Personal Dignity?	255
	3.1 Protected Persons in Swedish Law	256
	3.2 Are the Dead Persons?	257
	3.3 Are the Dead Protected Persons under IHL in IAC?	259
	3.4 Are the Dead Persons Protected by IHL in NIAC and under the War Crime of Committing Outrages upon Personal Dignity?	260
	3.5 Conclusion.....	264
4	Outrages upon Personal Dignity Entailing Criminal Liability	264
	4.1 Violation of Personal Dignity as a Crime Against International Law and a War Crime in Swedish Law	264
	4.2 The Prohibition of Outrages upon Personal Dignity of the Dead in IHL.....	266
	4.3 The War Crime of Committing Outrages upon Personal Dignity in ICL	269
	4.4 Is (Mere) Posing for Photos with Dead Persons a Criminal Outrage upon Personal Dignity?	272
5	Conclusion	277

The protection of human dignity is a cornerstone in international humanitarian law (IHL), several of its rules serve to protect the dignity of the human person in armed conflict, and dignity remains protected even in death. Despite this protection, outrages upon personal dignity of both living and dead persons are not infrequent in armed conflict, neither in history nor in contemporary conflicts. For example, despoiled bodies are used in war propaganda to demonstrate for the own population that the armed forces are victorious, and interned, wounded or fallen enemies are humiliated and documented in degrading positions in order to ridicule, demoralize and deter the enemy. The documentation of desecration, dehumanization and degrading treatment of dead persons in contemporary conflicts is vast. Pictures and videos of persons posing with fallen enemies, including decapitated heads, circulate on social media. This has raised the question whether such acts may constitute the war crime of outrage upon personal dignity. While international case law provide guidance on the general understanding of this war crime, it is mainly domestic courts that have dealt with the particular issue of outrages against the dead. It is therefore of relevance to study how domestic courts have dealt with these war crimes cases and whether there is interplay between domestic courts in different countries. Finland, Germany, the Netherlands, the US and Sweden have recently have tried such cases.

This article seeks to engage in this discussion through the lens of Swedish war crime legislation and case law. Since 2006, Sweden has prosecuted 13 persons for war crimes, of these, ten persons were convicted of war crimes,¹ two found to have committed a terrorist offence,² and one person was found not guilty.³ Most cases include humiliating and degrading aspects and three of the more recent cases concern the specific issue of whether posing for photos with dead persons may constitute the war crime of outrage upon personal dignity. An introduction of these three cases forms the starting point for the article and sets out the core legal issues subsequently discussed. Thereafter, the form of the Swedish legislation on war crimes, the old and the new, that were applicable in these cases is outlined. The discussion then turns to the legal issues that were central in the three cases. Starting with whether dead persons may be considered

* The author wishes to thank Mark Klamberg and Lydia Lundstedt, editors of this special edition, for their patience, valuable comments and review suggestions and Ellen Policinski for valuable comments and helpful discussions.

¹ *Åklagaren ./. Arklöv*, Stockholms tingsrätt, Case B 4087-04, 18 December 2006; *Åklagaren ./. Makitan*, Stockholms tingsrätt, Case B 382-10, judgment, 8 April 2011; *Åklagaren ./. Mbanenande*, Svea hovrätt, Case B 6659-13, judgment 19 June 2014; *Åklagaren ./. Droubi*, Svea hovrätt, Case B 4770-16, judgment, 5 August 2016; *Åklagaren ./. Berinkindi*, Svea hovrätt, Case B 4951-16, judgment, 5 February 2017; *Åklagaren ./. Abdulkareem*, Hovrätten över Skåne och Blekinge, Case B 3187-16, judgment, 11 April 2017; *Åklagaren ./. Sakhanh*, Svea hovrätt, Case B 2259-17, judgment, 31 May 2017; *Åklagaren ./. Abdullah*, Södertörns tingsrätt, Case B 11191-17, judgment, 25 September 2017; *Åklagaren ./. Tabaro*, Svea hovrätt, Case B 6814-18, judgment, 29 April 2019; *Åklagaren ./. Saaed*, Göta Hovrätt, Case B 939-19, judgment, 24 September 2019. The last case has been appealed and is currently under review, thus the finding on war crimes is not final.

² *Åklagaren ./. Al-Mandlawi and Sultan*, Hovrätten för västra Sverige, Case B 5306-15, judgment, 30 March 2016.

³ *Åklagaren./. M.M.*, Svea Hovrätt, Case B 1248-12, judgment, 19 December 2012.

as protected persons under IHL in respect of this war crime in Swedish law, moving to what constitutes a violation of dignity entailing individual criminal liability for war crimes, and finally whether merely posing for photos with a fallen enemy is sufficient.

1 Swedish Cases Involving Outrages upon the Personal Dignity of the Dead

Three war crimes cases adjudicated in Sweden deal specifically with degrading treatment that violates the personal dignity of persons who have died in connection to armed conflicts; the cases of *Abdulkareem, Abdullah* and *Saeed*. The core legal issues in these cases are the same. Namely, whether the accused by posing for photographs with protected persons have subjected the victims to humiliating or degrading treatment that was calculated to seriously violate their personal dignity; and whether dead persons are protected persons under IHL within the meaning of Swedish law. Sweden was, however, not first out to try persons for war crimes committed in a similar manner, the three cases follow a path set out by Finnish and German courts.

The *Abdulkareem* case was the first time a Swedish court examined the question of whether posing for photos with dead persons could constitute a war crime. It was also the first case where the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406)⁴ (hereafter: the Act of 2014) applied. The prosecution was brought after Finnish and German courts had found similar acts to constitute a war crime and the prosecutor referred in the written evidence to these foreign cases.⁵ *Abdulkareem* was a member of the Iraqi armed forces in the non-international armed conflict (NIAC) between Iraq and the group “the Islamic State” (IS or Daesh), during spring-summer of 2015 when the relevant acts occurred. He had posed and let himself be photographed next to mutilated bodies of dead persons belonging to the enemy (IS), in connection to hostilities, and had later published two photos on Facebook.⁶ These, other photos, and a video of the situation showed that bodies had been tied up with chains and were dragged on the ground. They also showed *Abdulkareem* e.g. making a victory gesture in front of dead bodies and posing for photos using a tool to poke a head laying in a bowl and which had been separated from the body.⁷ The district court found *Abdulkareem* guilty of the war crime in section 4 para. 7 of the Act of 2014 of humiliating or degrading treatment that was calculated to seriously violate the personal dignity of four protected persons by posing with their dead bodies and publishing the photos on

⁴ Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser.

⁵ *Åklagaren ./. Abdulkareem*, Blekinge tingsrätt, Case B 569-16, judgment, 6 December 2016, p. 3 referering to *Åklagaren ./. Jebbar-Salman*, Birkalands tingsrätt, Case No. R16/1304, judgment, (16/112431), 18 March 2016; *Åklagaren ./. Hilal*, Centrala Tavastlands tingsrätt, Case No. R16/112863, judgment (16/214), 22 March 2016; The parties, Oberlandesgericht Frankfurt am Main, Case No. 5-3 StR 2/16-4-1/16, judgment, 12 July 2016.

⁶ *Abdulkareem*, Blekinge tingsrätt, 6 December 2016, p. 16.

⁷ *ibid*, p. 11.

social media.⁸ The appellate court established the finding of a war crime and increased the punishment. It held that the penal value was one year and six months imprisonment, but the sentence was to be reduced with reference to an already established sentence of imprisonment and deportation for a different crime, and thus amended the punishment to nine months.⁹

In *Abdullah*, the relevant acts had taken place in early 2014 before the entry into force of the Act of 2014 and thus the old war crimes provision ('crime against international law') in chapter 22 section 6 of the Swedish Criminal Code applied.¹⁰ Abdullah was a member of Syria's army at the time of the relevant acts and came to Sweden in mid-2015. In February 2016, he was accused of a crime against international law, gross crime, for having participated in the killing of persons pictured in a photo of him posing with a dead or seriously wounded person and at least four other dead or wounded persons on the ground around him. This investigation was eventually closed due to a lack of evidence. Following the judgment of the *Abdulkareem* case, however, Abdullah was in August 2017 accused of a crime against international law of normal degree for subjecting five persons to humiliating or degrading treatment by standing with his foot on and posing for photos with wounded or dead persons, knowing that it was taken with the intent to be used in Syria's war propaganda.¹¹ The investigation included a number of foreign cases but the prosecutor relied primarily on *Abdulkareem*.¹² The district court found him guilty of this crime, and set the sentence at eight months imprisonment.¹³ The judgment was not appealed.

The third case, *Saeed*, concerned a member of the Iraqi armed forces which fought with Peshmerga forces against IS in the area of Daquq in Kirkuk, Iraq, during spring of 2015. He applied for asylum in Sweden in December 2015. Saeed was accused of the war crime in section 4 para. 7 of the Act of 2014 of humiliating or degrading treatment that was calculated to seriously violate personal dignity in four instances by posing for photos with dead or seriously injured persons, which he had subsequently shared on Facebook. Photos and a video were central evidence also in this case. They showed that the accused

⁸ *ibid*, pp. 17-18.

⁹ *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 5.

¹⁰ 22 kap. 6 § Brottsbalken, BrB (1962:700). The provision was abrogated by lag (2014:407). The Act of 2014 entered into force 1 July 2014 and does not apply retroactively. The previous official translation of the Swedish Criminal Code (then translated as the Swedish Penal Code), updated until 1999, includes this crime and can be found at the website of the Swedish government, *Justitiedepartementet, Regeringskansliet, The Swedish Penal Code Ds 199:36*, 1 January 1999, <<https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/1999/01/ds-199936/>>.

¹¹ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 3.

¹² The Preliminary investigation report (Nationella Operativa Avdelningen, Krigsbrott 1 UtrS NOA, Förundersökningsprotokoll, AM-21116-16, 4 September 2017) included translations of The parties, Bundesgerichtshof, Case StB 27/16, decision, 8 September 2016, as well as *Jebbar-Salman*, Birkalands tingsrätt, 18 March 2016, *Hilal*, Centrala Tavastlands tingsrätt, 22 March 2016, and The parties, Oberlandesgericht Frankfurt am Main, 12 July 2016, which were also referred to in *Abdulkareem*.

¹³ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 21.

posed for photos with the wounded/dead, some of whom were desecrated, and that other persons in the group also placed a foot upon, spitted on and poked bodies with a weapon as well as referred to them with derogatory terms. The accused had subsequently shared (or had them shared) the photos on Facebook. The district court held the accused guilty of the war crime in section 4 para. 7 of the Act of 2014.¹⁴ The appellate court came to the same conclusion in guilt and the character of the crime but reversed the punishment from the 15 months imprisonment decided by the district court to one year imprisonment.¹⁵ The judgment was appealed and the Supreme Court has granted review but has at the time of writing not yet reviewed the case.¹⁶

Saeed is the first war crime case that the Supreme Court has accepted to review. Eight of the 13 war crimes cases (based both on the old provision in the Criminal Code and on the Act of 2014), including all three genocide cases, have been appealed to the Supreme Court but were not granted review.¹⁷ The main function of the Swedish Supreme Court is to act as a court of precedent and the review is much welcomed. It is hoped that the Supreme Court will elaborate on the chapeaux of the war crimes in the Act of 2014, and the scope of humiliating or degrading treatment that is calculated to seriously violate protected persons' personal dignity in order to clarify the law. As more of these cases can be expected in the future, it may provide important guidance to Swedish courts. Together with the German Federal Supreme Court's finding in a similar case in 2017,¹⁸ and other foreign cases, it may also come to be of relevance for the understanding of the scope of this war crime in international law and for other countries.

Since the *Saeed* case is under review by the Supreme Court, a more authoritative understanding of the law is expected. I will, nevertheless, use the district and appellate courts' findings in order to discuss the legal issues of focus in this article.

2 Swedish Legislation on War Crimes

The Swedish criminalization of core international crimes is found in a specialized legislation from 2014, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) (hereafter: the Act of 2014), which entered into force 1 July 2014. Before the adoption of the Act of 2014, war crimes were criminalized in chapter 22 section 6 of the Swedish Criminal Code (1962:700) as *folkrättsbrott*, which directly translates as 'crime

¹⁴ *Åklagaren ./ Saeed*, Örebro tingsrätt, Case B 1662-18, judgment, 19 February 2019, p. 15.

¹⁵ *Saeed*, Göta Hovrätt, 24 September 2019, pp. 5-6.

¹⁶ *Saeed*, Högsta domstolen, Case B 5595-19, decision, 23 March 2020.

¹⁷ *M.M.*, Högsta domstolen, Case B 454-13, decision, 12 March 2013; *Mbanenande*; Högsta domstolen, Case B 3706-14, decision, 18 August 2014; *Droubi*, Högsta domstolen, Case B 4088-16, decision, 10 January 2017; *Berinkindi*, Högsta domstolen, Case B 1302-17, decision, 25 April 2017; *Sakhanh*, Högsta domstolen, Case B 3157-17, decision, 20 July 2017; *Tabaro*, Högsta domstolen, Case B 2837-19, decision, 27 August 2019. See also *Al-Mandlawi* and *Sultan*, Högsta domstolen, Case B 2054-16, decision, 28 June 2016.

¹⁸ The parties, Bundesgerichtshof, Case 3 StR 57/17, judgment, 27 July 2017.

against international law'. The name is somewhat misleading as it appears to indicate a broad scope of international crimes. However, the offense only cover serious violations of IHL that may entail individual criminal liability, hence, corresponding to war crimes. As concerns other relevant core crimes of international law in Swedish law before the adoption of the Act of 2014, the crime of genocide was regulated in the Act on Criminal Responsibility for Genocide (1964:169),¹⁹ but there was no crime against humanity in Swedish law until 2014.

The war crime cases related to outrage upon personal dignity against the dead hereto decided by Swedish courts includes cases decided based on the old provision in the Criminal Code as well as on the new provision in the Act of 2014. As mentioned, both provisions correspond to war crimes under international law. The provision in the Criminal Code maintains some relevance for future prosecutions as it remains applicable to acts that occurred before the entry into force of the Act of 2014. While the material scope is similar for these crimes, there are significant differences in the form of the legal texts and it is thus necessary to outline both.

2.1 The Old Provision in the Criminal Code

The old provision of war crimes, the 'crimes against international law' (*folkrättsbrott*), located in chapter 22 section 6 of the Criminal Code, was abrogated in July 2014 but remains applicable to acts that occurred before that point. This offense was originally adopted in 1948 in chapter 27 section 11 of the then applicable Penal Code,²⁰ and has since been amended and moved a number of times, for example following Sweden's ratification of the Geneva Conventions I-IV of 1949 (GC I-IV).²¹ Chapter 22 section 6 of the Criminal Code defines crimes against international law as a serious violation of a treaty or a generally recognized principle or tenet (meaning customary international law (CIL)) relating to international humanitarian law concerning armed conflicts. The section lists a number of non-exhaustive examples of such serious violations. These examples include *inter alia* use of any weapon prohibited by international law (pt 1); attacks on civilians or on persons who are injured or disabled (pt 3); occasioning severe suffering to persons enjoying special protection under international law, coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians of their liberty in contravention of international law (pt 6); arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law (pt 7).

The crime against international law provision involves that several separate acts directed against different persons or objects and at separate occasions

¹⁹ Lag (1964:169) om straff för folkmord.

²⁰ 27 kap. 11 § Strafflagen (SL). See further Gihl, Torsten, *Angående begreppet 'folkrättsbrott'*, *Nordic Journal of International Law* 1952, vol. 22, no. 1, pp. 240-256.

²¹ Prop. 1953:142 Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i 1 och 27 kap. strafflagen, m. m., p. 13; Simpson, Gerhard, *Internationell Straffrätt*, *Svensk Juristtidning* 1956, issue 1, pp. 316-317.

together are considered as one offense, even if each act separately may be considered as a serious violation of IHL.²² In the determination of whether the crime is gross it shall, according to Criminal Code chapter 22 section 6, be considered whether many persons have been killed or hurt and whether significant damage to property has been caused by the acts. The hereto decided cases demonstrate that weight is placed on the number of wounded or killed persons, abuse of a position of power in relation to vulnerable persons deprived of their liberty, whether the crime has been part of a widespread attack on civilians or otherwise been of a systematic nature, the cruelty of the acts, and the number of acts.²³ The sanction is imprisonment for a maximum of four years if the crime is of normal degree. If the crime is considered gross, the sanction is maximum 18 years imprisonment or life imprisonment. A sentence of life imprisonment may be converted to a fixed time sentence that is equal to or over 18 years, which is the maximum fixed time sentence in Swedish criminal law.

The notion of ‘serious violation’ in the crime against international law in Chapter 22 section 6 of the Criminal Code should be considered as reflecting the general understanding of war crimes in CIL as encompassing serious violations of IHL that entail criminal liability,²⁴ and excluding violations that are not serious. It means that the provision encompasses but is not restricted to the grave breaches regime of the GC I-IV.²⁵ This follows from the legal text since the initial part refers to a variety of sources of IHL and since the examples include acts not listed as grave breaches in GC I-IV and the Rome Statute of the International Criminal Court, 1998 (ICC Statute), e.g. use of prohibited weapons. Swedish courts have also established individual criminal liability based on serious violations of IHL norms that are not included in the grave breaches regime.²⁶ The Stockholm district court explained in the case of *M.M.* that:

the design of the legislation which refers to *serious violation* in chapter 22 section 6 of the Criminal Code cannot be deemed to restrict the applicability of the law as to

²² *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 63–64; *Makitan*, Stockholms tingsrätt, 8 April 2011, p. 78; *Mbanenande*, Svea hovrätt, 19 June 2014; *Berinkindi*, Svea hovrätt, 5 February 2017, p. 51; *Åklagaren ./. Tabaro*, Stockholms tingsrätt, Case B 13688-16, judgment, 27 June 2018, p. 178.

²³ *Mbanenande*, Svea hovrätt, 19 June 2014, p. 20; *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 63–64; *Makitan*, Stockholms tingsrätt, 8 April 2011, pp. 21 and 78; *Åklagaren ./. Berinkindi*, Stockholms tingsrätt, Case B 12882-14, judgment, 16 May 2016, p. 137; *Åklagaren ./. Sakhanh*, Stockholms tingsrätt, Case B 3787-16, judgment, 16 February 2017, p. 41, para. 68.

²⁴ ICRC, *IHL Database, Customary IHL*, rule 156. Definition of War Crimes, <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>>, (hereafter: ICRC, *CIHL database*). ICRC’s database over customary international humanitarian law (CIHL) is a continuously updated digital version of ICRC, Doswald-Beck, Louise and Henckaerts, Jean-Marie, *Customary International Humanitarian Law: Vol. 1 Rules & Vol. 2 Practice*, Cambridge: Cambridge University Press, 2005. See also Prop. 2013/14: 146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, pp. 32–33.

²⁵ Article 50 GC I; article 51 GC II; article 130 GC III; article 147 GC IV; article 85 AP I.

²⁶ See *Mbanenande*, Svea hovrätt, 19 June 2014, p. 20; *Berinkindi*, Stockholms tingsrätt, 16 May 2016, p. 25; *Tabaro*, Stockholms tingsrätt, 27 June 2018, p. 177; *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 63–64; *Abdulkareem*, Blekinge tingsrätt, 6 December 2016, p. 8, *Abdullah*, Södertörns tingsrätt, 25 September 2017, pp. 8-9 and 11.

only refer to the grave breaches in the Geneva Conventions. The reference to serious violation must instead be understood as an expression that the acts charged for must not be violations against IHL which is of limited seriousness.²⁷

The crime against international law attributes criminal liability under the Swedish Criminal Code through a direct reference to IHL (a technique called *blankettstraffbud*). As such it provides an unusual element of monism in the generally dualist Swedish legal system.²⁸ This unusual form means that the court must seek the scope and content of the offense directly from international law, more precisely IHL and ICL, and general principles of domestic criminal law. This means that the scope of the Swedish offense is to a large extent decided by international law; what is considered a serious violation of IHL at a certain point in time is criminalized under this provision. Accordingly, it is essential that judges and other actors involved in a case have solid knowledge on IHL.²⁹ This, in Swedish law, unusual form of the offense has been discussed in the literature and over time sparked concern. The concern has mainly focused on the scope of the offense and whether individual criminal liability under Swedish law could be based on CIL in light of the principle of legality.³⁰ This concern coupled with the will to harmonize Swedish law with the ICC Statute were two of the main underlying reasons why a public investigation in 2002 recommended a reform of the form of the crime against international law and the creation of a specialized legislation for war crimes and other core international crimes.³¹ Nevertheless, it took until 2014 before the reform process was completed. In the meantime, the district court of Stockholm answered the question of whether individual criminal liability could be based on CIL in the affirmative in the first case on crime against international law, *Arklöv*.³² A few years later, but also before the legislative reform, the Supreme Court stated in NJA 2012 p. 105, a case involving a different offense with the same form (*blankettstraffbud*), that the principle of legality in Swedish criminal law does not present an obstacle for this type of provision. Yet, questions lingered and the preparatory works to the Act of 2014 raised concern that questions of legality could come up again in the future

²⁷ *Åklagaren ./. M.M.*, Stockholms tingsrätt, Case B 5373-10, judgment 20 January 2012, p. 53. (Author's translation). This case was appealed and the accused was found not guilty, the court of appeal dealt primarily with evidentiary issues and did not elaborate further on this or other issues of law, *M.M.*, Svea hovrätt, 19 December 2012. See also Österdahl, Inger, "Folkrättsbrott i svenska domstolar: En våldsamt utveckling", in Samuelsson Kääntä, Jenny; Almkvist, Gustaf; Svensson, Erik and Skarhed, Anna (eds.), *Vänbok till Lena Holmqvist*, Uppsala: Iustus Förlag, 2019, p. 363.

²⁸ Klamberg, Mark, *Fråga om tillämpning av legalitetsprincipen beträffande Folkrättsbrott*, *Juridisk Tidskrift* 2007-08, vol. 19, no. 1, p. 131; Asp, Petter, "Folkrätten och den svenska straffrätten", in Stern, Rebecca and Österdahl, Inger (eds.), *Folkrätten i svensk rätt*, Kina: Liber, 2012, pp. 64-65; Cameron, Ian, "Swedish International Criminal Law Rules & 'Gross Human Rights Offences'", in Asp, Petter (ed.), *Flores juris et legum – Festskrift till Nils Jareborg*, Uppsala: Iustus Förlag, 2002, p. 148.

²⁹ On how knowledge on IHL is has evolved throughout the Swedish war crimes cases, see Österdahl, 2019, who also argues for the importance of further learning.

³⁰ Klamberg, 2007-08, p. 131; Asp, 2012, pp. 64-65; Cameron, 2002, p. 148.

³¹ SOU 2002:98 Internationella brott och svensk jurisdiktion, pp. 303-305.

³² *Arklöv*, Stockholms tingsrätt, 18 December 2006. See further, Klamberg, 2007-08.

depending on the development of CIL and that this spoke for a reform.³³ On the other hand, scholars have emphasized the advantages of a provision referring directly to IHL. The inbuilt flexibility in that type of provision means that the offense follows developments in international law and this was highlighted as a valuable method that meant that contemporary developments in international law relating to war crimes had a strong standing in Swedish law.³⁴

2.2 *The New Provision in the Specialized Act of 2014*

The Act of 2014 implements Sweden's international obligations relating to individual criminal liability for war crimes, crime against humanity and genocide. An underlying aim behind the reform with a specialized act was to adopt the crime against humanity in Swedish law, in order to bring Swedish law in line with the ICC Statute, and gather these core international crimes in one legislative act.³⁵ The crime of aggression is not included. A public investigation has recommended that Sweden ratify the Kampala amendments and implement the crime of aggression into the Act of 2014, and rename it so that the name covers also that crime.³⁶

The Act of 2014 includes war crimes labelled as *krigsförbrytelser*, which directly translates as war crimes and is a more adequate label than crime against international law (*folkrättsbrott*). The Act of 2014 establishes individual criminal liability for an exhaustive list of war crimes that are explicitly set out in the act; thus using both a different terminology and a different form than the former provision in the Criminal Code. The Act of 2014 establishes war crimes against persons (sections 4–5), war crimes against property (section 6), war crimes through the abolition of the right of access to a court (section 7), war crimes concerning specially protected missions or emblems (section 8), war crimes through the use of prohibited methods of warfare (section 9), and war crimes through the use of prohibited weapons (section 10)³⁷. Unlike the non-exhaustive list of examples in the crime against international law, the Act of 2014 lists which war crimes are covered by the Act in a number of exhaustive paragraphs under each section. The sanction for war crimes is imprisonment of a maximum of six years, or for gross war crimes a minimum of four years and a maximum of 18 years or life. In determining whether a war crime is to be

³³ Prop. 2013/14:146, pp. 68–69.

³⁴ Bring, Ove and Träskman, Per Ole, “Folkrättens starka roll inom svensk straffrätt bör bestå – nu vill regeringen dumpa den”, *Dagens Juridik*, 20 February 2014, <<http://www.dagensjuridik.se/2014/02/folkrattens-starka-roll>>; Bring, Ove and Träskman, Per Ole, “Det är obegripligt att Justitiedepartementet kan påstå att systemskiftet sker med vårt goda minne”, *Dagens Juridik*, 17 February 2014, <<http://www.dagensjuridik.se/2014/02/det-ar-obegripligt-att-justitiedepartementet>>.

³⁵ Prop. 2013/14:406, pp. 69–70.

³⁶ SOU 2018:33, Aggressionsbrottet och ändringar i Romstadgan, pp. 96–98; SOU 2018:87, Aggressionsbrottet i svensk rätt och svensk straffrättslig domsrätt, pp. 122–124.

³⁷ The offenses unlawful handling of chemical weapons in chapter 22 section 6 (a) of the Criminal Code and unlawful handling of mines in chapter 22 section 6 (b) of the Criminal Code may be relevant if a nexus to the conflict is lacking or in peacetime.

considered as gross, special consideration shall be attached to whether the act is committed as part of a plan or policy or as part of extensive crimes or whether the act has caused death, severe pain or injury or severe suffering to persons, extensive damage to property or particularly serious damage to the natural environment (section 11). According to section 16 of the Act of 2014, a person may be held liable for attempt, preparation or conspiracy to commit or failure to reveal a war crime in line with chapter 23 of the Criminal Code.³⁸

Another novelty with the Act of 2014 is that it specifies superior responsibility for all crimes in the act. It set out the liability as a perpetrator for a military or civilian superior who fails to take measures that he/she could possibly have taken and that were necessary and reasonable to prevent a subordinate answerable to the superior and under the superior's effective control from committing the crimes listed in the act (section 13). Further, it establishes liability for failure to exercise control (section 14) and liability for failure to report a crime (section 15). The sanction for superior responsibility for the latter two is a maximum of four years of imprisonment.

The war crimes listed in the Act of 2014 thus have a completely different form than the previous provision in the Criminal Code. The Act of 2014 has a dualist approach and specifically sets out the war crimes that are part of Swedish law in the legislation itself, replacing the previous monistic provision. This means that the Act does not necessarily follow the developments of CIL as the crime against international law did through its monistic form. Instead, the legislator should be more active to amend the Act when required by CIL or Sweden's treaty obligations. The Act means that courts shall apply Swedish legislation, and IHL and international criminal law (ICL) will mainly have impact through interpretation. The preparatory works emphasize that guidance should be sought in the international legal instruments that form the basis of the crimes and in international case law, since the Act aims to implement Sweden's international legal obligations, and particularly that terms in the Act which have a particular meaning under IHL be interpreted in line with international law.³⁹ It also follows from the nature of this type of legislation that guidance may be derived from foreign legal sources, including cases applying legislation based on the same international norms.⁴⁰ A few monist elements do, however, remain. Section 3 on protected persons and section 8 para. 2 on emblems refer directly to IHL, meaning that the court shall decide who is a protected person or what is a protected emblem under the Act of 2014 based on the IHL norm that applies in the specific case.

The war crimes regulation in the Act of 2014 differs from the war crimes listed article 8 of the ICC Statute in a number of ways but contains the war crimes listed in the Statute. The Act also implements other international instruments and there was an ambition to use a modern language and concrete, accessible

³⁸ As well as an act of genocide or a crime against humanity.

³⁹ Prop. 2013/14: 146, p. 78.

⁴⁰ Herre, Johnny, "Användningen av utländsk rätt i Högsta domstolen på det förmögenhetsrättsliga området", in Udsen, Henrik et al., *Festskrift till Mads Bryde Andersen*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2018, p. 221.

provisions with ICL terminology.⁴¹ A difference is that the Act does not separate the war crimes applicable in international armed conflict (IAC) and in NIAC in the same manner as the ICC Statute does. Sections 4, 6, 8-10 of the Act of 2014 apply both to IAC, including occupation, and NIAC while only sections 5 and 7 apply exclusively to IAC, including occupation. All war crimes provisions in the Act also provide *chapeaux*, a joint criterion for all war crimes that the act “is part of or otherwise connected with an armed conflict or occupation”, and hence, has a nexus to the armed conflict.

The preparatory works to the Act of 2014 appear to have influenced courts not only in the cases where this Act applied but also in cases where the old provision in the Criminal Code applied that were decided after publication of the preparatory works to the Act of 2014.⁴² This may indicate that the preparatory works facilitated the courts’ resort to relevant international norms and case law that is required under the former provision. And further that the legislative reform was more a change in form than substance (although differences may exist), as the scope in the Act of 2014 is more limited by its detailed provisions influenced by the ICC Statute.

3 Are Dead Persons Protected by the War Crime of Committing Outrages upon Personal Dignity?

A central question in *Abdulkareem, Abdullah* and *Saeed* is whether dead persons could be considered as protected persons under the war crime of committing humiliating or degrading treatment that is calculated to seriously violate their personal dignity. Swedish district and appellate courts answered this in the affirmative,⁴³ and so joined a number of domestic courts in other countries, including the German Federal Supreme Court.⁴⁴ This conclusion has, however, met criticism that merits further discussion. Ambos has criticized the judgment by the German Federal Supreme Court, arguing that the Court’s finding that dead persons are protected persons under IHL within the meaning of section 8(1) no. 9 of the German Code of Crimes against International Law is unconvincing.⁴⁵ The arguments raised points to that domestic courts should engage deep in IHL and ICL when international case law does not offer clear guidance. I will in the following first describe how Swedish law set out who is a protected person by war crimes, and then examine whether dead persons may be protected by the war crime of committing outrages upon personal dignity under international law in the meaning of Swedish law and address Ambos’ arguments that are based on IHL and ICL.

⁴¹ Prop. 2013/14: 146, pp. 69-70.

⁴² *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 10; *Mbanenande*, Svea hovrätt, 19 June 2014, p. 20.

⁴³ *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 2; *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 14; *Saeed*, Göta Hovrätt, 24 September 2019, p. 4.

⁴⁴ The parties, Bundesgerichtshof, 27 July 2017

⁴⁵ Ambos, Kai, *Deceased Persons Within the Meaning of International Humanitarian Law: German Federal Supreme Court Judgment of 27 July 2017*, *Journal of International Criminal Justice* 2018, vol. 16, issue 5.

3.1 *Protected Persons in Swedish Law*

Neither the former provision in the Criminal Code nor the Act of 2014 define who is a protected person, both refer to IHL in this regard. The Act of 2014, however, gives some guidance as section 3 states that a ‘protected person’ is a person who is wounded, sick, shipwrecked, a prisoner of war, a civilian or “in some other capacity, enjoys special protection” under GC I-IV, AP I or customary international humanitarian law (CIHL). This shall be determined based on the international legal sources applicable to the specific situation. The preparatory works mention in addition IHL’s respective protection of e.g. persons *hors de combat* and religious and medical personnel, also the special protection of women and children as rendering these categories of persons as ‘protected persons’ under section 3 of the Act of 2014. Accordingly, ‘protected persons’ are in Swedish law broader than the traditional concept of ‘protected persons’ in IHL as only covering persons protected by the GC I-IV, and it may be understood as ‘persons protected by IHL’, including also protection under CIHL in NIAC. It is emphasized in the Preparatory works that the Act of 2014 is intended to encompass acts criminalized in the ICC Statute, which are presumed to constitute CIL, and in addition, further acts that may be criminalized under CIL.⁴⁶ This involves that the personal scope of the corresponding crime in the ICC Statute should be taken into account when determining who is a protected person under the war crimes in the Act of 2014, provided that the acts were prohibited by CIHL, in order to ensure legal foreseeability. If CIL entails that a wider category of persons are protected, this should also be considered as covered by the Act, provided that CIL is clear on this point.⁴⁷

The district and appellate courts in *Abdulkareem*, *Abdullah* and *Saeed* considered, without much engagement with IHL, that the dead or seriously wounded persons covered in the photos and videos were protected by IHL -as dead or *hors de combat* -by being wounded or rendered as such by death- and thus were protected persons for the purposes of Swedish law.⁴⁸ This was mainly the focus in *Abdulkareem*, where the district court noted that the footnote in the ICC Elements of Crimes states that dead persons can be included in ‘persons’ under this crime.⁴⁹ With reference to the preparatory works’ explicit objective that the Act of 2014 would encompass what is criminalized under the ICC Statute,⁵⁰ and by holding that the ICC Statute is a codification of CIL, the court found that dead persons must be considered as protected under the corresponding

⁴⁶ Prop 2013/14:146, p. 130.

⁴⁷ See the Council of Legislations’ opinion in Prop. 2013/14: 146, p. 596.

⁴⁸ *Abdulkareem*, Blekinge tingsrätt, 6 december 2016, pp. 7-8 and 10; *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 2; *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 14; *Saeed*, Örebro tingsrätt, 19 February 2019, p. 11; *Saeed*, Göta Hovrätt, 24 September 2019, p. 4.

⁴⁹ *Abdulkareem*, Blekinge tingsrätt, 6 December 2016, p. 16.

⁵⁰ *ibid*, p. 16 with reference to Prop. 2013/14: 146, p. 69.

war crime in section 4 para. 7 of the Act of 2014.⁵¹ The appellate court upheld this view and the subsequent judgments appear to endorse this conclusion.⁵²

3.2 *Are the Dead Persons?*

The question of whether the dead are protected persons relates to the discussion on whether the dead are *persons*, and whether they are right holders or beneficiaries.⁵³ Ambos argues that dead persons are not persons in the meaning of German law and IHL.⁵⁴ The discussion of personhood largely fall outside the scope of this article, suffice to note that domestic understandings and legislation on personhood and the dead may affect the determination of who is a person that war crimes can be committed against.⁵⁵ IHL and ICL, however, are central in the determination of the protective scope and it is thus relevant whether the dead are protected as persons under IHL, or in another capacity –i.e. as objects. War crimes may be committed against both persons and objects, but the war crime of violating personal dignity is listed in the Act of 2014 as a war crime against persons.⁵⁶ Whereas it is debatable whether the dead have rights under IHL, the families of the dead have a right under IHL in IAC, and possibly in NIAC, to know the fate of their relatives.⁵⁷ In comparison, the European Court of Human Rights (ECtHR) have held that article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR) do not apply to the dead and the dead do not have standing before the court.⁵⁸ However, the families do and may be victims of violations of article 3 ECHR when the dead have been mutilated, because of their suffering which has been considered as degrading treatment.⁵⁹ Inappropriate handling of the dead has also been considered as a violation of the families' rights under article 8 by the ECtHR.⁶⁰ IHL, on the other hand, is not right-based. It establish a few rights but primarily privileges and

⁵¹ *ibid.*, p. 17.

⁵² *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 2; *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 14; *Saeed*, Örebro tingsrätt, 19 February 2019, p. 11; *Saeed*, Göta Hovrätt, 24 September 2019, p. 4.

⁵³ See e.g. Smolensky, Kirsten Rabe, *Rights of the Dead*, Hofstra Law Review, 2003, vol. 37, issue 3; Kramer, Matthew H., *Do Animals and Dead People have Legal Rights?*, Canadian Journal of Law and Jurisprudence 2001, vol. 14, no. 1.

⁵⁴ Ambos, 2018, pp. 1114-1115.

⁵⁵ See The parties, Bundesgerichtshof, 27 July 2017 and Ambos argument that the Court's reasoning on personhood is contra the prohibition of analogy in German law, Ambos, 2018, pp. 1114-1115.

⁵⁶ Section 4 Act of 2014.

⁵⁷ Article 32 AP I; rule 117 ICRC, *CIHL Study*; Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict*, Oxford: Oxford University Press, 2012, p. 284.

⁵⁸ *Akpınar and Altun v. Turkey*, (Appl. No. 56760/00), ECtHR, judgment, 27 February 2007, para. 82.

⁵⁹ *ibid.* para. 86; *Akum and others v. Turkey*, (Appl. No. 21894/93), ECtHR, judgment, 24 March 2005, para. 259.

⁶⁰ *Genner v. Austria*, (Appl. No. 55495/08), ECtHR, judgment, 12 January 2016, para. 35.

protection for persons, and obligations of the parties. Therefore, I would argue that it is not as significant whether the dead have rights under IHL or are mere beneficiaries of the obligations of the parties to protect them and treat them with respect. Similarly, war crimes are not based on violations of claimable rights, they are based on violations of IHL norms; norms that often are termed in the form of obligations of the parties and participants, or in the form of protection of certain persons or objects that the parties and participants must respect or fulfill. Whether the dead have rights is therefore not decisive for whether an act directed against a dead person may be considered as a war crime or not. Whether the dead are persons is on the other hand more relevant since it would seem logical that only persons could be protected persons.

Ambos further argues that the dead are neither considered as persons nor protected persons under IHL. This is based on GC I's distinction between sick and wounded on the one hand and the dead on the other, and AP I's reference to 'the remains' of a person who has died, indicating that personhood ceases as a result of death. He also holds that NIAC law does not mention the dead as protected persons.⁶¹ Let us therefore first look to the terminology used in IHL. The Geneva Conventions and its Protocols refer to 'dead person',⁶² 'the dead',⁶³ 'the killed',⁶⁴ 'bodies',⁶⁵ 'the remains of deceased',⁶⁶ and 'remains of persons who have died',⁶⁷ of which 'the dead' is most common. All terms are considered as synonyms.⁶⁸ The obligations include that the remains of the dead are to be treated with respect,⁶⁹ that the dead are protected in a similar –though more limited– way as living persons (from public exposure, mutilation and pillage),⁷⁰ as well as duties related to their wills and respectful disposal in line with their wishes and religious beliefs.⁷¹ The varied terminology and the obligations do not provide a definite answer to whether the dead are considered as persons or whether it is objects that are protected. The notions of 'bodies' and 'remains' indicate that the dead are considered as objects, while the notions of 'dead

⁶¹ Ambos, 2018, p. 1115.

⁶² Article 16 GC I; articles 19 and 20(2) GC II.

⁶³ Articles 15(1) and 17 GC I; articles 18(1) and 20(1) GC II; article 8 AP II. See also rules 112-116 ICRC, *CIHL Study*.

⁶⁴ Article 15 GC IV.

⁶⁵ Article 17(3) GC I.

⁶⁶ Title of article 34 AP I.

⁶⁷ Article 34 AP I.

⁶⁸ Petrig, Anna, *The War Dead and Their Gravesites*, *International Review of the Red Cross*, 2009, vol.91, no. 874, p. 343.

⁶⁹ Article 34(1) AP I.

⁷⁰ Article 15(1) GC I; 18 GC II; rules 112-113 ICRC, *CIHL Study*. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, Cambridge: Cambridge University Press, 2016, (hereafter, ICRC, *Commentary on GC I*, 2016), para. 1512; ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd edition, 2020, <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>, (hereafter, ICRC, *Commentary on GC III*, 2020), para. 4527.

⁷¹ Article 17 GC I; article 120 GC III; articles 129-130 GC IV; article 34 AP I; article 8 AP II.

persons' and 'respect' and that they are entitled to the same type of obligations (though not of the same scope) as living persons indicate that they are considered as persons. Further, an answer might be sought through an examination of who is a protected person and person protected by IHL.

3.3 *Are the Dead Protected Persons under IHL in IAC?*

The concept of 'protected persons' refers mainly to the categories of persons (sick, wounded and shipwrecked members of the armed forces, prisoners of war and certain civilians) that are entitled to protection by the respective Geneva Conventions and relevant parts of AP I, and thus applies in IAC.⁷² The dead are not included in the provisions establishing the respective main protective personal scope of GC I-IV (article 13 GC I, article 13 GC II, article 4 GC III and article 4 GC IV). This may be explained by the fact that the main parts of the Conventions are focused on rescuing and respecting the lives of persons that find themselves in vulnerable positions due to their status in the conflict and the obligations vis-à-vis the dead are limited. This is also why the sick and wounded are distinguished from the dead in the obligation to search for these in article 15(1) GC I mentioned by Ambos. All three must be searched for, collected and protected. The distinguishing part relates to that it only makes sense to require that the parties ensure adequate care to the living, while the dead need be protected against despoilment.⁷³ Moreover, also other categories than the sick, wounded, shipwrecked, prisoners of war and civilians mentioned are protected by the GC I-IV and AP I. For example, civil defense personnel are protected by a more limited number of provisions and considered as protected persons in regard to relevant norms.⁷⁴ In a similar vein, dead persons could be considered as protected persons under GC I and II in regard to the specific norms affording obligations vis a vis the dead.

In comparison to GC I and II, GC III and IV are more clear that (some) dead persons do constitute protected persons. If prisoners of war die in the hands of the enemy party they remain protected persons under GC III and its rules on the dead apply to them.⁷⁵ Similarly, if persons interned based on article 41-43, 68 or 79 of GC IV die during internment they remain protected persons under GC IV

⁷² It may be used to denote civilians who are protected by GC IV, i.e. civilians who find themselves in the hands of a party to a conflict or an occupying power of which they are not nationals (article 4 GC IV), but also encompass those that have status as sick or wounded (article 13 GC I), shipwrecked (article 13 GC II) or prisoner of war (or entitled to the same protection, article 4 GC III) and accordingly are protected by GC I, II or III respectively, as well as relevant parts of AP I.

⁷³ Obligations to search for the dead in GC I and GC II are understood as to encompass dead members of one's own armed forces as well as of enemy forces, although members of the own forces are otherwise not protected persons under the Conventions. Article 15(1) GC I; article 18(1) GC II; Petrig, 2009, p. 349. In contrast, obligations concerning identification of the dead for reasons of notifying the enemy party are only applicable to "dead person of the adverse Party". Article 16(1) GC I; article 19 GC II.

⁷⁴ Articles 61-68 AP I.

⁷⁵ Articles 120-121 GC III.

and its rules on the dead apply.⁷⁶ This, however, excludes protected persons under GC IV who are not interned. As Petrig has explained, this means that some but not all dead are protected persons under the GC I-IV, and which obligations that are applicable to them depends on where the fallen are found (on land/in the sea) and on their prior status (prisoners of war/interned civilians).⁷⁷

AP I and CIHL may fill gaps to the limited personal scope. The obligation in article 34(1) AP I to respect the remains of dead persons has a considerably wider scope of application than the Conventions. It applies to the remains of all persons who have died for reasons related to occupation, in detention resulting from occupation or hostilities, and persons who are not nationals of the country in which they have died as a result of hostilities unless they receive more favourable consideration under the GC I-IV or any other provision of AP I. The obligation in article 34(1) AP I to respect the remains of dead persons is understood as to include to prevent the dead from being despoiled or exposed to public curiosity and to dispose of them in accordance with the religious beliefs of the dead, to the extent this is possible.⁷⁸ The ICRC CIHL Study found that the parties of IAC and NIAC must “search for, collect and evacuate the dead without adverse distinction”,⁷⁹ and that parties must prevent the dead from being despoiled and that mutilation of the dead is prohibited.⁸⁰ It is also linked to the respect for the dead person’s family and their right under article 32 AP I to know the fate of their relatives.⁸¹ The Study refers to the dead without any qualification or limitation, thus providing “the broadest possible *ratione personae* concept” in IHL, where the only qualification “is that death must have resulted from an armed conflict or occupation.”⁸² Hence, persons who have died for reasons related to the conflict may be considered as protected persons in IAC, and their remains must be respected.

3.4 Are the Dead Persons Protected by IHL in NIAC and under the War Crime of Committing Outrages upon Personal Dignity?

As protected persons is traditionally an IAC concept, it appears more adequate in NIAC to refer to persons protected by IHL. Because NIAC law is activity based rather than status based, Additional Protocol II, 1977 (AP II) does not define protected person in the manner used in the GC I-IV. In contrast, article 2(1) AP II provides that the Protocol applies “to all persons affected by an armed conflict”, not depending on where in the territory of the State that is a party to

⁷⁶ Articles 129-131 GC IV.

⁷⁷ Petrig, 2009, p. 356.

⁷⁸ ICRC, Sandoz, Yves, Swinarski, Christophe, and Zimmerman, Bruno (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: Marinus Nijhoff Publishers, 1987, para. 1307. (Hereafter ICRC, *Commentary to AP I and AP II*, 1987).

⁷⁹ Rule 112 ICRC, *CIHL Study*.

⁸⁰ Rule 113 ICRC, *CIHL Study*.

⁸¹ Article 32 AP I.

⁸² Petrig, 2009, p. 356, footnote 128.

such conflict they are located.⁸³ In comparison to the GC I-IV, the protection of the dead in NIAC is limited and without detail. Article 8 of AP II merely requires that the parties shall search for the dead, prevent them from being despoiled and “decently dispose” of the dead. To this, however, comes the above mentioned CIHL rules, which are applicable in NIAC as well. Hence, those who have died for reasons related to a NIAC are protected by IHL in regard to certain limited norms. The obligations protecting the dead serve to ensure respect for personal and human dignity and are applications of IHL’s general prohibitions of pillage and outrages upon personal dignity.⁸⁴

The relevant war crime in the ICC Statute as well as in the Act of 2014, is also based on IHL’s general prohibitions of humiliating and degrading treatment and other outrages on personal dignity, primarily article 3(1)(c) GC I-IV, article 4(2)(e) AP II (in NIAC) and article 75(2)(b) AP I (in IAC). Relevant to understand these terms in concrete situations are other rules protecting dignity and honor that are applicable to the particular circumstances. This may be the rules protecting the dignity and honor of prisoners of war and civilians,⁸⁵ or the above mentioned rules protecting the dignity of the dead through concrete obligations of search, protection from pillage and mutilation and decent disposal/burial taking religion into account. Focus is here placed on article 3 GC I-IV and NIAC rules since this applied in the three Swedish cases.

Article 3 GC I-IV is a fundamental provision since it establishes minimum guarantees of humane treatment. The article protects “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause” who are in the power of a party to the conflict. The scope of persons protected by this provision is thus distinguished “by way of explicit delimitations” from those that do take active part in hostilities.⁸⁶ The dead are per definition not taking part in hostilities, regardless of whether they were civilians or participants in the conflict before death. While they are not listed among the examples and often not mentioned in the enumeration of persons protected by article 3 GC I-IV,⁸⁷ it is by way of excluding those that do take part that the article forms its protective scope. According to the ICRC commentary to article 3 GC I-IV, the dead are protected by *parts of* article 3 GC I-IV (see below).⁸⁸ In contrast to the dead, there is reason to underline in the provision that a (living) person with a fighting function who has laid down his arms or is sick, wounded or detained is protected since these are among the most vulnerable to abuse, and subject to the full protection of article 3 GC I-IV. By comparison, the dead are not included in article 41 AP I’s definition of who is an enemy *hors de combat*. Article 3 GC I-IV is broader as it merely requires that a person has fallen

⁸³ ICRC, *Commentary to AP I and II*, 1987, para. 4490.

⁸⁴ Petrig, 2009, p. 350.

⁸⁵ E.g. articles 13-14 GC III; article 27 GC IV.

⁸⁶ ICRC, *Commentary on GC I*, 2016, para. 519.

⁸⁷ See e.g. *ibid*, paras. 521-539.

⁸⁸ *ibid*, paras. 611, 760, 811 and 824 mentioning outrage upon personal dignity, including mutilation, search for and collect of the dead along with the wounded and sick, and services of humanitarian assistance benefiting dead persons.

in the hands of a party, not necessarily an enemy party, and because it provides a non-exhaustive list of examples and adds “any other cause”, which shall not be narrowly construed.⁸⁹ It has been argued that death can be considered as one such cause rendering a person *hors de combat* and protected by article 3 GC I-IV,⁹⁰ as dead members of armed forces are clearly and permanently placed out of combat.

Logically, the parts of article 3 GC I-IV that concern the protection of life, physical and mental health, against hostage taking and for judicial guarantees apply to living persons only. Given that the dead shall be respected and protected against despoliation and mutilation, a different approach may, however, be taken in regard to protection of dignity. The ICRC Commentary to article 3 GC I-IV demonstrates in regard to mutilation the line between which prohibition is applicable to living persons only and which is (also) applicable to the dead. The prohibition in article 3(1)(a) GC I-IV is described as protecting against permanent disfigurement and thus understood as applying exclusively to the living.⁹¹ Mutilation of the dead is however also prohibited as it is covered by outrage upon personal dignity under article 3(1)(c) GC I-IV.⁹² The International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber finding in *Tadić* that discharging a fire extinguisher into the body of a dead person could not be considered as inhumane treatment supports this distinguishing line. The Chamber held that certain acts against the dead offend “some notions of respect for the human being upon death” but did not deal with the prohibition against outrage upon personal dignity, possibly because it was charged for as inhumane treatment.⁹³ It can be concluded that article 3(1)(c) GC I-IV protects dead persons who died for reasons related to the conflict, regardless of which party they belonged to and provided that they are in the power of a party to the conflict, –whereas the other parts of the article do not.

As mentioned, the ICC Elements of Crimes states in a footnote that for the purposes of the war crime of committing outrages upon personal dignity, the dead are considered as persons and protected by this war crime.⁹⁴ Arguments have been put forward that a mere footnote cannot expand the scope of persons covered by this war crime and that international case law does not support the finding that the dead are protected by this war crime.⁹⁵ However, the clarification on dead persons was inserted by the Preparatory Commission (PrepCom) in order to implement the case law from post-World War II trials on outrages

⁸⁹ *ibid*, para. 539.

⁹⁰ Petrig, 2009, p. 350.

⁹¹ *Prosecutor v. Mbarushimana*, ICC P-T. Ch. I, decision on the confirmation of charges, ICC-01/04-01/10, 16 December 2011, para. 154; ICRC, *Commentary on GC I*, 2016, para. 611.

⁹² ICRC, *Commentary on GC I*, 2016, para. 611. See also rule 113 ICRC, *CIHL Study*.

⁹³ *Prosecutor v. Tadić*, (Case No. IT-94-1-T), ICTY T. Ch., judgment, 7 May 1997, para. 748.

⁹⁴ Elements of Crimes (EoC), article 8(2)(b)(xxi), footnote to element 1, and article 8(2)(c)(ii), footnote to element 1.

⁹⁵ Ambos, 2018, p. 1115. See also arguments raised by the defence in *The parties, Bundesgerichtshof*, 27 July 2017.

against the dead.⁹⁶ This included violations of IHL norms that were found to constitute war crimes or crimes against humanity, meaning that the dead were considered as protected by such crimes. For example, in the *Max Schmidt* case, a German medical officer was convicted of war crimes for having detached the head from the body of a dead American soldier, and then “boiled it, removed the skin and flesh and bleached the skull which he kept on his desk for several months”, failing to provide a proper burial.⁹⁷ The court found that this was a violation of CIL prohibiting disgraceful treatment and mutilation of dead bodies in force at the time that entailed individual criminal liability.⁹⁸ In the *Pohl* case, that concerned e.g. massive killing and looting of property of Jewish civilians, the US Military Tribunal at Nuremberg stated that “Robbing the dead, even without the added offense of killing, is and always has been a crime.”⁹⁹ The clarification in the Elements of Crimes indicates that the PrepCom and the Assembly of State Parties considered that such acts entail individual criminal liability, in IAC as well as in NIAC. It was recognized in the ICRC CIHL Study,¹⁰⁰ and finds further support in the literature.¹⁰¹ The mere fact that this was placed in a footnote to the Elements of Crimes should not diminish its value. The design of the Elements of Crimes means that each element is kept similar and short throughout and this kind of explanations are normally placed in footnotes. Since the crime is based on article 3(1)(c) GC I-IV which covers the dead, the footnote does not expand the scope of the crime. Rather, it provides important clarification, derived from CIL and WW II case law (dead persons) and human rights law (cultural aspects) that the victim need not necessarily have been aware of the outrage for the subjective element to be fulfilled.¹⁰² Notably there have been few international cases on outrages upon the dead between the World War II related cases and the contemporary domestic cases, despite that violations against the dead have been documented in several armed conflicts in between. Relevant cases from the International Criminal Tribunal for Rwanda (ICTR) and ICTY, e.g. *Bagosora* and *Brdanin* (see part 4.2 below), do however demonstrate that the dead have been considered as protected by IHL continually after the World War II trials.

⁹⁶ Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 314.

⁹⁷ *Max Schmid*, (Case No. 82), US General Military Government Court, 19 May 1947, reported in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, 1949, vol. XIII, London: His Majesty's Stationary Office, p.151.

⁹⁸ *ibid*, p. 152.

⁹⁹ *The United States of America v. Pohl et al.*, (Case No. 4), United States Military Tribunal, Nuernberg, Germany, opinion and judgment, 3 November 1947, reproduced in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. V, Washington: United States Government Printing Office, 1950, p. 996.

¹⁰⁰ Rule 113, ICRC, *CIHL database*.

¹⁰¹ See e.g. Petrig, 2009, 350; Sivakumaran, 2012, p. 281; ICRC, *Commentary on GC I*, 2016, para. 668 (on article 3).

¹⁰² Dörmann, 2003, p. 314.

3.5 Conclusion

It follows from IHL's rules protecting the dead that dignity remains protected after death, and the part of article 3 GC I-IV prohibiting outrages upon personal dignity also encompass the dead. Hence, dead persons are protected by IHL and there is a legal obligation under treaty and CIHL to protect and respect the dignity of those who died for reasons related to an international or non-international armed conflict. The ICC Statute with its Elements of Crimes and WW II case law demonstrate that failure to do so may entail criminal liability for war crimes, meaning that the dead are protected under the war crime of committing outrages upon personal dignity.

The special protection of the dead in IHL should, in a similar manner as the protection of women and children referred to the preparatory works of the Act of 2014, be considered to render the dead 'protected persons' under section 3 of the Act of 2014 for the purpose of section 4 para. 7 of the Act of 2014 and chapter 22 section 6 of the Criminal Code. It follows that the approach taken by the Swedish district and appellate courts that the dead are protected by IHL alternatively as dead or *hors de combat* and thus protected persons for the purposes of Swedish law is based in CIHL and consistent with the protective scope of the ICC Statute.

4 Outrages upon Personal Dignity Entailing Criminal Liability

The other core issue in *Abdulkareem, Abdullah and Saeed* is whether posing for photographs with dead persons constitutes humiliating or degrading treatment that was calculated to seriously violate their personal dignity. I will in the following first describe how this war crime is construed in Swedish law, then examine the primary norms in IHL and the elements of the corresponding war crime in ICL, and finally discuss whether (mere) posing for photos with dead persons may bring about individual liability for this crime.

4.1 Violation of Personal Dignity as a Crime Against International Law and a War Crime in Swedish Law

Section 4 para. 7 of the Act of 2014 establishes that a person is guilty of a war crime if he or she subjects a protected person to humiliating or degrading treatment that is calculated to seriously violate their personal dignity, if the act is part of or otherwise connected with an armed conflict or occupation. It applies in both IAC and NIAC. The preparatory works provide that the offense should be understood in light of the case law of the ICTY and ICTR and that it is sufficient that the treatment was aimed at violating the personal dignity, the victim need not have experienced outrage. This is ensured by the formulation that the treatment be *calculated* to seriously violate their personal dignity. Because of the broad scope of the offence, the violation of the relevant IHL norm must be serious to bring about individual criminal liability.¹⁰³

¹⁰³ Prop. 2013/14: 146, p. 144.

The war crime in section 4 para. 7 of the Act of 2014 corresponds to the war crime of committing outrages upon personal dignity, in particular humiliating and degrading treatment, in articles 8(2)(b)(xxii) and 8(2)(c)(ii) of the ICC Statute. The same crime is covered by the statutes of the *ad hoc* tribunals, either explicitly (ICTR) or through a reference to violations of the laws and customs of war (ICTY).¹⁰⁴ The ICTY has held that outrages upon personal dignity without doubt constitutes a serious violation of common article 3 GC I-IV that entails individual criminal liability under CIL.¹⁰⁵ This finding of the ICTY is of particular relevance for interpretation of the former provision in Swedish criminal law, the crime against international law in chapter 22 section 6 of the Criminal Code.

As mentioned in part 2.1, the provision on crime against international law lists a number of non-exhaustive examples of serious violations of IHL entailing individual liability. Humiliating or degrading treatment or other outrages upon personal dignity is however not included. Thus, Swedish courts do not have guidance in the legislative text in regard to such acts but must establish that they constitute a serious violation of IHL directly based on international treaty and CIL. In the very first war crimes case adjudicated at trial in Sweden, *Arklöv*, Stockholm district court found that engaging in humiliating and degrading treatment prohibited by article 3 GC I-IV and article 4 AP II constitutes a serious violation of treaty and CIHL and falls under the crime against international law.¹⁰⁶ Appellate courts have confirmed this in subsequent cases.¹⁰⁷ In *Abdullah*, Södertörns district court clarified that violations of personal dignity is prohibited in armed conflict by treaty and CIL, considered a war crime under CIL and thus should be considered as a serious violation of generally recognised principle or tenet relating to IHL concerning armed conflicts entailing criminal liability under chapter 22 Section 6 of the Swedish Criminal Code.¹⁰⁸ The court based its finding on international legal sources and the preparatory works to the Act of 2014.¹⁰⁹ Accordingly, war crimes cases adjudicated in Sweden have concluded that violations of articles 3 GC I-IV and 4 AP II, such as outrages upon personal dignity, may constitute a crime against international law in situations where chapter 22 section 6 of the Criminal Code is applicable (situations before 1 July

¹⁰⁴ Article 4(e) Statute of the ICTR. ICTY found that this offense fell within article 3 of its statute in *Prosecutor v. Aleksovski*, (Case No. IT-95-14/1-T), ICTY T. Ch., judgment, 25 June 1999, paras. 48 and 54; *Prosecutor v. Kvočka et al.*, (Case No. IT-98-30/1-A), ICTY A. Ch., judgment, 28 February 2005, para. 323. See also *Prosecutor v. Aleksovski*, (Case No. IT-95-14/1-A), ICTY A. Ch., judgment, 24 March 2000, paras. 21-22 and 26.

¹⁰⁵ *Prosecutor v. Kunarac*, (Case No. IT-96-23-T and IT-96-23/1-T), ICTY T. Ch., judgment, 22 February 2001, para. 408; *Prosecutor v. Kunarac et al.*, (Case No. IT-96-23 and IT-96-23/1-A), ICTY A. Ch., Judgment, 12 June 2002, para. 67.

¹⁰⁶ *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 13, 59-60 and 61.

¹⁰⁷ *Mbanenande*, Svea hovrätt, 19 June 2014, p. 20 refererering to *Åklagaren ./. Mbanenande*, Stockholms tingsrätt, Case B 18271-11, judgment, 20 June 2013, pp. 36-37 and 105-106, para. 206; *Berinkindi*, Svea hovrätt, Case B 4951-16, judgment, 5 February 2017, p. 50 referring to *Berinkindi*, Stockholms tingsrätt, 16 May 2016, pp. 36-37.

¹⁰⁸ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 11.

¹⁰⁹ *ibid*, p. 10.

2014),¹¹⁰ and the war crime of section 4 para. 7 of the Act of 2014 where the Act is applicable (after 1 July 2014).¹¹¹

A majority of the war crimes cases adjudicated in Sweden show that the accused acted with contempt for the human dignity of persons (in various ways) belonging to the enemy party to the conflict and establish liability for humiliating or degrading treatment, or other outrages upon personal dignity. Accordingly, there is a number of examples displaying the range of what type of acts and omissions this may cover. The first Swedish cases dealt with systematic violence and degrading treatment against detainees in armed conflicts in the former Yugoslavia. Outrages included e.g. subjecting detainees to overcrowded detention facilities without lavatories and with a lack of food and water; forcing detainees to perform meaningless work e.g. to pick spruce cones;¹¹² forcing detainees to perform sexual activities on each other; to clean the lavatories and thereafter eat bread without being allowed to clean their hands; to beat other internees;¹¹³ to graze grass while making animal sounds;¹¹⁴ and discriminatory, derogatory statements.¹¹⁵ The cases concerning Rwanda include degrading acts such as forcing persons to undress before killing them,¹¹⁶ and detaining civilian women and girls in overcrowded facilities of deplorable condition.¹¹⁷ These acts have been committed in parallel to genocide, torture or other violence to life and limb, and often in detention. The focus in these cases is primarily on accusations of genocide or other violence to life or limb. The humiliating or degrading treatment or other outrage have, however, not gone unnoticed. The repetitive findings of such acts alongside genocide and violence to life and limb indicates that systematic atrocities thrive when human dignity is violated. The cases of *Abdulkareem*, *Abdullah* and *Saeed* are the only cases that focus solely on outrages on personal dignity, and which concern dead (or seriously wounded) persons. It follows that it is in these cases that the courts treat outrages upon personal dignity more in-depth. The courts' reasoning in regard to posing for photos as humiliating or degrading treatment will be further discussed in part 4.4 below.

4.2 The Prohibition of Outrages upon Personal Dignity of the Dead in IHL

As regards the primary norm(s) to this war crime, protection for human dignity is fundamental in IHL and human rights law. Respect for human dignity has been

¹¹⁰ *Mbanenande*, Svea hovrätt, 19 June 2014, p. 20; *Berinkindi*, Stockholms tingsrätt, 16 May 2016, p. 25; *Tabaro*, Stockholms tingsrätt, 27 June 2018, p. 177; *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 63–64; *Abdullah*, Södertörns tingsrätt, 25 September 2017, pp. 8-9 and 11.

¹¹¹ *Abdulkareem*, Blekinge tingsrätt, 6 December 2016, p. 8.

¹¹² *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 59-64.

¹¹³ *Makitan*, Stockholms tingsrätt, 8 April 2011, pp. 67-74.

¹¹⁴ *ibid*, p. 70.

¹¹⁵ *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 59-64; *Makitan*, Stockholms tingsrätt, 8 April 2011, pp. 68-69.

¹¹⁶ *Berinkindi*, Stockholms tingsrätt, 16 May 2016, p. 137.

¹¹⁷ *Tabaro*, Svea hovrätt, 29 April 2019, p. 48.

described as “the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law.”¹¹⁸ IHL requires humane treatment and deals with three types of prohibited treatment: outrages upon human dignity, in particular through humiliating and degrading treatment; cruel and inhumane treatment; and torture. All three are prohibited in central provisions; common article 3 of the GCI-IV, article 4 AP II and article 75 AP I, as well as under CIHL.¹¹⁹ This is further strengthened by the corresponding, non-derogable three-dimensional prohibition in human rights law of torture, cruel, inhuman or degrading treatment or punishment.¹²⁰ These prohibitions are interlinked and central in international law because they present a chain that protects the dignity and bodily and mental integrity of the human person. The lines between these prohibitions may at times be unclear, in particular between the two latter,¹²¹ which unlike torture do not require a specific intent. However, each has its specific characteristics. Sivakumaran has explained that the prohibition of inhuman treatment centers around protection of bodily and mental integrity and requires that the victim experienced a certain level of suffering, while outrages upon personal dignity centers around honor, dignity and self-respect, and may be violated without the victim being aware of the outrage.¹²² The latter is also linked to protection from insults and public curiosity.¹²³ And, as we have seen, only the latter protect dead persons.

While torture and inhuman treatment are part of the grave breaches regime of the Geneva Conventions listed as war crimes in the ICC Statute,¹²⁴ outrage upon personal dignity is not.¹²⁵ This difference coupled with that inhuman treatment require severe pain or suffering demonstrates that humiliating or degrading treatment and other outrages upon personal dignity is “the least serious type of

¹¹⁸ *Prosecutor v. Furundzija*, (Case IT-95-17/1-T), ICTY T. Ch., judgment, 10 December 1998, para. 183.

¹¹⁹ Rule 90, ICRC, *CIHL database*.

¹²⁰ See e.g. articles 7 and 10 International Covenant on Civil and Political Rights, 1966 (ICCPR); articles 1, 2 and 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; article 3 ECHR.

¹²¹ ICRC, *Commentary to GC I*, 2016, para. 671. A clear example appear in *Furundzija* where the Trial Chamber refer to inhuman treatment as “an attack on human dignity”. *Furundzija*, ICTY T. Ch., 10 December 1998, para. 183.

¹²² Sivakumaran, 2012, p. 263.

¹²³ Article 13 GC III; article 27 GC IV; *Kurt Maelzer*, (Case 63), US General Military Commission, Florence, trial 9-14 September 1946, reported in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, 1949, vol. XI, London: His Majesty’s Stationary Office, pp. 54-55; Sivakumaran, 2012, p. 263.

¹²⁴ Article 50 GC I; article 51 GC II; article 130 GC III; article 147 GC IV; article 8(2)(a)(ii) ICC Statute.

¹²⁵ Notably, “practices of ‘apartheid’ and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination” are included in the grave breaches regime based on article 85(4)(c) AP I. It is, however, not listed as a grave breach in the ICC Statute but as other serious violations of the laws and customs applicable in IAC and as serious violations of article 3 GC I-IV in NIAC. Article 8(2)(b)(xxii) and (c)(ii) ICC Statute.

ill-treatment under IHL”.¹²⁶ In comparison with the three-dimensional prohibition in human rights law, outrages upon personal dignity corresponds to the notion of degrading treatment. While it is the “lesser” of the three interlinked prohibitions and crimes, it is of importance.¹²⁷ As formulated by the ICTY Appeals Chamber in *Aleksovski*:

[a]n outrage upon personal dignity /.../ is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*. It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality.¹²⁸

Since dignity is protected both before and after death, the prohibition of outrages upon personal dignity in article 3(1)(c) GC I-IV (in contrast to the other parts) should when relevant be interpreted in light of IHL’ treaty and customary rules on the dead.¹²⁹ Article 8 of AP II merely requires that the parties shall search for the dead, prevent them from being despoiled and “decently dispose” of them. The understanding of similar terms in IAC rules may also guide the interpretation of article 8 AP II. Whereas the IAC rules go further, are more detailed and of a practical nature, both IAC and NIAC rules serve to ensure that human dignity is respected after death and shield the dead from being pillaged, mutilated and used to dehumanize the enemy. Further, the difference in NIAC and IAC is not as significant as treaty law indicates when CIHL is considered (see above). Rules relating to the dead’s dignity and honor in NIAC involves that they shall be treated with respect, be protected from being despoiled and mutilated and be decently disposed of, if possible in a manner that respects their religious wishes. The scope of the positive obligations of search, burial that takes the religious beliefs of the dead into account, and return of remains to the next of kin are relative to the prevailing circumstances and the capacity of organized armed groups.¹³⁰ In contrast, the negative aspects of the protection such as the prohibitions of despoilment, mutilation and other outrages against personal dignity of the dead, including, “not to interfere with the body” shall be respected

¹²⁶ Nowak, Manfred, “Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment” in Clapham, Andrew and Gaeta, Paola, (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, p. 400. See also ICRC, *Commentary on GC I*, 2016, para. 671. See also *Prosecutor v. Kvočka et al.*, (Case No. IT-98-30/1-T), ICTY T. Ch., judgment, 2 November 2001, para. 172.

¹²⁷ Nowak, 2014, p. 400; Schabas, William, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition, Oxford: Oxford University Press, 2016, p. 250. See also *Kvočka*, where the Trial Chamber consider outrage upon personal dignity as a less serious form of inhumane treatment, i.e. acts that are deserving of punishment even though they do not necessarily involve severe suffering or long term harm. *Kvočka*, ICTY T. Ch., 2 November 2001, para. 172. While reasonable in terms of severity, this description fails to capture the characteristic focus on humiliation, degradation, ridicule and other outrages as that the primary norm aim to prohibit.

¹²⁸ *Aleksovski*, ICTY A. Ch., 24 March 2000, para. 54. Italics in original, footnotes omitted.

¹²⁹ ICRC, *Commentary on GC I*, 2016, para. 611 and 760.

¹³⁰ Sivakumaran, 2012, p. 283.

at each time.¹³¹ Understanding article 3 GC I-IV's prohibition on outrage upon personal dignity in light of IHL's concretization of protection of the dead's personal dignity safeguards real and tangible respect for human dignity.

4.3 *The War Crime of Committing Outrages upon Personal Dignity in ICL*

Turning to the elements of the war crime of committing outrages upon personal dignity, in particular humiliating or degrading treatment, the *actus reus* requires that the perpetrator committed or participated in an act or omission that humiliated, degraded or otherwise violated the dignity of a person, of such severity as to be generally considered as an outrage upon personal dignity.¹³² There is a difference in severity between what is prohibited under IHL and what renders individual criminal liability under ICL.¹³³ The treatment or other form of outrage may be perpetrated through acts, omissions or statements.¹³⁴ The determination is based on subjective and objective elements.

The subjective element takes into account the individual victim's suffering, sensitivity and cultural background.¹³⁵ Age, gender, religious belief and other relevant aspects may affect the determination of whether humiliating or degrading treatment or other outrage have been committed. The religious aspect means that to force someone to act in a way that is contrary to their religion could be a war crime, even if that specific act would not be degrading for a person of a different religion.¹³⁶ The fact that a victim has recovered from the humiliation does not mean that there was no outrage,¹³⁷ and the victim may even be dead, unconscious or in other ways unaware of the humiliation.¹³⁸ The crime serves not only to protect the personal dignity of the individual victim but also human dignity more broadly understood.

Given that a victim need not be aware of the outrage and that the culpability of the perpetrator must not rest only on the sensitivity of the individual victim, there is also an objective element. Not everything that causes humiliation or degradation entails criminal liability; a degree of severity is required. This is ensured in the ICC Elements of Crimes through the requirement that the

¹³¹ *ibid.*, p. 282.

¹³² EoC, article 8(2)(b)(xxi), elements 1 and 2 and article 8(2)(c)(ii), elements 1 and 2; *Prosecutor v. Brima et al.*, (Case No. SCSL-04-16-T), SCSL T. Ch., judgment, 20 June 2007, para. 716.

¹³³ Sivakumaran, 2012, p. 264.

¹³⁴ *Kvočka*, ICTY T. Ch., 2 November 2001, para. 172.

¹³⁵ *ibid.* para. 167; EoC, article 8(2)(b)(xxi), element 1, fn 49, and article 8(2)(c)(ii), element 1, fn 57.

¹³⁶ Dörmann, 2003, p. 315; *Chiuchi et al.*, (Case No. 65), Australian Military Court at Rabaul, judgment, 12 July 1946.

¹³⁷ *Kunarac*, ICTY T. Ch., 22 February 2001, para. 501; *Kvočka*, ICTY T. Ch., 2 November 2001, para. 168.

¹³⁸ EoC, article 8(2)(b)(xxi), element 1, and article 8(2)(c)(ii), element 1.

humiliation or degradation is must *generally* be recognized as an outrage.¹³⁹ This derives from the case law of the ICTY, although it appears that the ICTY Appeals Chamber in *Kunarac* endorsed a stricter approach, requiring that the humiliation generally be recognized as serious.¹⁴⁰ The humiliation or degradation can be instant, there is no requirement that it has taken place or caused humiliation or degradation over a certain time.¹⁴¹ The circumstances in which an act takes place may also involve that an act is considered serious enough even if it in and of itself would not generally be considered as an outrage.¹⁴² In determining whether the elements are met, the nature, severity and length of the act or omission, the context in which it occurred and the intensity and length of the victim's (potential) suffering should be considered as well as whether a reasonable person would be outraged.¹⁴³

As for the *mens rea*, there need not be an intent to humiliate. Awareness that the act would generally have that effect is sufficient. The perpetrator need not know that the acts *would* cause serious humiliation, degradation or outrage on human dignity, but he must have known that it *could*.¹⁴⁴ Further, there must be an armed conflict and the perpetrator must be aware of the factual circumstances establishing the conflict.¹⁴⁵ The ICC Elements of Crimes add that in NIAC the perpetrator must have been aware of the factual circumstances that establish the victim as a person protected by this war crime. I.e. a person covered by article 3 GC I-IV, e.g. persons who have laid down their arms, are *hors de combat* or were religious personnel taking no part in hostilities, and including, as clarified in a footnote, dead persons.¹⁴⁶

International case law is mainly (but not exclusively) focused on the living and examples include: death threats and repetitive screams over loudspeaker;¹⁴⁷ the use of detainees as human shields and trench-diggers;¹⁴⁸ physical violence and causing constant fear of physical, mental or sexual violence or being

¹³⁹ EoC, article 8(2)(b)(xxi), elements 1 and 2, and article 8(2)(c)(ii), elements 1 and 2. See also *Prosecutor v. Katanga and Chui*, ICC PT. Ch., Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 369.

¹⁴⁰ *Kunarac*, ICTY A. Ch., 12 June 2002, para. 163.

¹⁴¹ *Kunarac*, ICTY T. Ch., 22 February 2001, para. 501; *Prosecutor v. Sesay et al.*, (Case No. SCSL-04-15-T), SCSL T. Ch., judgment, 2 March 2009, para. 176; *Katanga and Chui*, ICC PT. Ch., 30 September 2008, para. 369.

¹⁴² *Prosecutor v. Katanga et al*, ICC P-T. Ch., Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2018, paras. 375-376.

¹⁴³ Schabas, 2016, p. 248.

¹⁴⁴ *Aleksovski*, ICTY A. Ch., 24 March 2000, para. 27; *Kunarac*, ICTY A. Ch., 12 June 2002, paras. 164-165; *Brima*, SCSL T. Ch., 20 June 2007, para. 716.

¹⁴⁵ EoC, article 8(2)(b)(xxi), element 4, and article 8(2)(c)(ii), element 6.

¹⁴⁶ EoC, article 8(2)(c)(ii), element 4 and the footnote to element 1.

¹⁴⁷ *Aleksovski*, ICTY T. Ch., 25 June 1999, paras. 227-228.

¹⁴⁸ *ibid*, para. 229.

robbed;¹⁴⁹ abduction and sexual slavery;¹⁵⁰ sexual violence and forced nudity;¹⁵¹ forcing detainees to perform subservient acts;¹⁵² harassment that forced detainees to relieve bodily functions in their clothing;¹⁵³ and deplorable conditions of detention.¹⁵⁴ A clear example of how the subjective element may affect the application of the objective element is the post-World War II *Chiuchi* case, where the Australian Military Court found that forcibly cutting of the beard and hair of Sikh prisoners of war and forcing them to smoke constituted a war crime because it was contra their religious beliefs.¹⁵⁵ Similar to what the Swedish cases indicate, the international case law demonstrated that outrages upon personal dignity often occurs in detention facilities.

The categorization of outrages upon personal dignity and inhumane treatment is not consistently dealt with by the ICTY or the ICTR. Particularly in relation to sexual and gender based assault, which sometimes have been found to constitute outrages upon personal dignity and sometimes inhuman treatment, at times without explanatory differences. Rape may also constitute torture.¹⁵⁶ This depends partially on the formulation of war crimes in their respective statutes.¹⁵⁷ However, under both the ICC Statute and the Swedish Act of 2014 rape and other forms of sexual violence are war crimes in their own right,¹⁵⁸ and cruel or inhumane treatment and outrages upon personal dignity are listed as separate war crimes.¹⁵⁹ This may contribute to a clearer line between which acts fall under the respective crime, and move from outrages being considered as the lesser crime of the three to develop its characteristic focus on dignity and honor.

¹⁴⁹ *ibid.*, paras. 184-210; *Kvočka*, ICTY T. Ch., 2 November 2001, para. 172.

¹⁵⁰ *Prosecutor v. Taylor*, (Case No. SCSL-03-01-T), SCSL T. Ch., judgment, 18 May 2012, para. 432.

¹⁵¹ *Furundzija*, ICTY T. Ch., 10 December 1998, para. 272; *Kunarac*, ICTY T. Ch. 22 February 2001, paras. 766-774.

¹⁵² *Kvočka*, ICTY T. Ch., 2 November 2001, para. 172.

¹⁵³ *ibid.*

¹⁵⁴ *Prosecutor v. Limaj et al.*, (Case No. IT-03-66-T), ICTY T. Ch., judgment, 30 November 2005, para. 285.

¹⁵⁵ *Chiuchi*, Australian Military Court at Rabaul, 12 July 1946.

¹⁵⁶ *Kunarac*, ICTY A. Ch., 12 June 2002, para. 192; *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), ICTR T. Ch., judgment, 2 September 1998, para. 597.

¹⁵⁷ Article 4(e) AP II and article 4(4) ICTR Statute lists rape, enforced prostitution and any form of indecent assault as examples of outrages upon personal dignity, in addition to humiliating and degrading treatment. The ICTY Statute article 3 refers to violations of the laws or customs of war and thus violations of e.g. the respective article 3 GC I-IV prohibitions are not listed as individual war crimes.

¹⁵⁸ Article 8(2)(b)(xxii) and (e)(vi) ICC Statute; section 4 para. 5 Act of 2014. See further Sjöholm, Maria, *Sexual Violence and Gender Based Crimes*, Scandinavian Studies in Law, 2020, vol. 66.

¹⁵⁹ Article 8(2)(a)(ii) and (c)(i) and respectively (b)(xxi) and (c)(ii); section 4 para. 2 and respectively para. 7 Act of 2014.

4.4 Is (Mere) Posing for Photos with Dead Persons a Criminal Outrage upon Personal Dignity?

There are few cases holding individuals to account for outrages upon personal dignity of the dead but multiple examples of its reported occurrence. Examples include the dragging of dead American soldiers on the streets of Mogadishu,¹⁶⁰ Colombians mutilating dead members of the Revolutionary Armed Forces of Colombia (FARC) to have proof of death for the purposes of collecting rewards,¹⁶¹ Egyptian soldiers mutilating dead bodies and filming it to share among the force,¹⁶² and the disclosed abuses in Abu Graib prison, Iraq, which included military police taking photos of degrading treatment of dead detainees. In the latter case a number of situations of ill-treatment were tried and sanctioned by US military courts.¹⁶³ Another example where persons have been held accountable in military courts concerns members of the US armed forces taking and keeping body parts as souvenirs and taking “trophy photos” with fallen enemies in Iraq and Afghanistan.¹⁶⁴ These are all examples that violate the prohibitions of despoilment of the dead and humiliating or degrading treatment or other outrage upon their dignity. The more complicated question is if posing for photos with dead persons, without physical interference with the body, meets the above described elements to constitute a war crime under international and Swedish law.

Turning to international case law, cases from WW II involves, in addition to the acts mentioned in part 3.3, persons found guilty of crimes violating the dignity of the dead by mutilation, cannibalism, keeping bones as souvenirs and denying them a proper burial.¹⁶⁵ In more recent times, the ICTR described in *Bagosora* the desecration of Prime Minister Uwilingiyimana’s dead body as “a profound assault on human dignity meriting unreserved condemnation under

¹⁶⁰ Levinson, Arlene, *Dead Soldier Dragged Through Somali Streets a Modern-Day Unknown*, Los Angeles Times, 16 January 1994, <<https://www.latimes.com/archives/la-xpm-1994-01-16-mn-12448-story.html>>.

¹⁶¹ McDermott, Jeremy, *FARC Rallies its Battered Troops*, BBC News, 2 March 2009, <<http://news.bbc.co.uk/2/hi/americas/7901470.stm>>.

¹⁶² Geneva Council for Rights and Liberties, *Egypt: Mutilation and Desecration of Corpses Constitute War Crimes*, 21 March 2020, <<http://genevacouncil.com/en/2020/03/21/egypt-mutilation-and-desecration-of-corpses-constitute-war-crimes/>>.

¹⁶³ Amnesty International, *USA: Human Dignity Denied: Torture and Accountability in the ‘War on Terror’*, 27 October 2004, <<https://www.amnesty.org/download/Documents/92000/amr511452004en.pdf>>

¹⁶⁴ Cavendish, Julius, *US Apologises for ‘Repugnant Actions of Soldiers in Afghanistan*, The Telegraph, 21 March 2011, <<https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8395735/US-apologises-for-repugnant-actions-of-soldiers-in-Afghanistan.html>>; Graham, Marty, *US Navy Seal Spared Jail but Demoted after War Crimes Trial*, Reuters, 3 July 2019, <<https://www.reuters.com/article/us-usa-navyseal-warcrimes/u-s-navy-seal-spared-jail-but-demoted-after-war-crimes-trial-idUSKCN1TY1BJ>>.

¹⁶⁵ See *Schmid*, United States General Military Government Court, 19 May 1947, in *Law Reports of Trials of War Criminals*, 1949, p. 152, which lists a number of other cases relating to World War II covering the mentioned acts.

international law”,¹⁶⁶ and burying dead persons in latrine pits were found to constitute “a serious attack on human dignity”.¹⁶⁷ In *Niyitega*, a dead man was decapitated and castrated and his head and genitals were put on public display,¹⁶⁸ and a dead woman was undressed and a piece of wood was pierced into her genitalia before her body was left on a street for public display.¹⁶⁹ The ICTR considered this to constitute “a serious attack on the human dignity of the Tutsi community as a whole”.¹⁷⁰ In examining violations of article 3 GC I-IV as part of a crime against humanity in *Bradantin*, the ICTY found that disrespecting dead bodies, mutilating dead bodies, mass graves and re-burial aimed at covering up crimes constituted humiliating treatment.¹⁷¹ These acts before the *ad hoc* tribunals were charged for as crime against humanity and found to meet the gravity of persecution to amount to that crime. This does not mean that similar acts could not constitute war crimes. Rather, the fact that these acts were considered serious violations of an IHL norm indicates such acts could constitute war crimes, provided that the other constitutive elements be fulfilled. Hence, despoilment, mutilation, degrading disposal and reburial, denial of burial and degrading public exposure are considered as serious violations of the dignity of the dead that may entail criminal liability in international law. While this case law provides guidance to domestic courts, the guidance is limited in regard to the specific question of degrading without physically interfering with the dead. Foreign case law based on similar international legal sources may therefore provide complementary guidance.¹⁷²

The international cases on humiliating or degrading treatment or other outrages against the dead considered as war crimes or crimes against humanity concern acts that are not just seriously degrading but also dehumanizing, and many involve acts that physically violate the bodily integrity of the dead. It is easy to see that such acts are of the severity that they would generally be considered as outrages to the ordinary person. Cases concerning outrages against living persons reflect a broader spectrum of acts and omissions, of more varied severity, and include derogatory statements. The question is if this indicates that the severity threshold is higher for outrages against the dead than the living. There appear, however, not to exist a legal basis or support in the literature for a differentiated understanding of the severity threshold for living or dead, and the Elements of Crimes establish the same requirement for living and dead.¹⁷³

¹⁶⁶ *Prosecutor v. Bagosora*, (Case No. ICTR-98-41-A), ICTR A. Ch., judgment, 14 December 2011, para. 729. The Appeals Chamber found, however, that Bagosora could not be held liable for this act since it was not included in the indictment.

¹⁶⁷ *Prosecutor v. Bagosora*, (Case No. ICTR-98-41-T), ICTR T. Ch., judgment, 18 December 2008, paras. 2220 and 2222.

¹⁶⁸ *Prosecutor v. Niyitegeka*, (Case No. ICTR-96-14-T), ICTR, T. Ch., judgment, 16 May 2003, para. 303.

¹⁶⁹ *ibid*, para. 316.

¹⁷⁰ *ibid*, para. 467.

¹⁷¹ *Prosecutor v. Bradantin*, (Case No. IT-99-36-T), ICTY T. Ch., judgment, 1 September 2004, para. 1019.

¹⁷² Herre, 2018, p. 221.

¹⁷³ EoC, article 8(2)(b)(xxi), element 2, and article 8(2)(c)(ii), element 2.

What is generally considered as an outrage by the reasonable person may though possibly depend on whether it is directed against a living person or a dead person. The German Federal Supreme Court expressed that in relation to dead persons “mere verbal abuse, insults, or other humiliating or degrading treatment of deceased persons that is not associated with physical acts do not qualify as an atrocity.”¹⁷⁴ International case law provides that physical interference is not required for this crime, but when insulting or degrading statements have been found to constitute degrading treatment, this has taken place in further degrading circumstances.¹⁷⁵ This is also the case for Swedish case law.¹⁷⁶ Acts covered by this war crime are seldom committed in a vacuum. Whereas certain acts may be clearly outrageous in and of themselves, others may reach the threshold by being considered in light of the context where they are committed.¹⁷⁷ To this end, e.g. the duration, public exposure or the presence of observers, or whether the act form part of a chain of degrading treatment committed by several persons together may affect the determination of severity.

The context in *Abdulkareem* involved four dead persons laid on the ground, some had been tied up with a belt and a chain and were partially unclothed, and a head had been separated from the body. Bodies were dragged on the ground and one was transported on the hood of a car. The appellate court found that the dead persons had been transported to and placed on the location in a degrading manner and that the subsequent posing and taking of photos undertaken by several persons were a continuation of that degrading treatment. Several persons had been present and taken part in the photographing.¹⁷⁸ Also in *Abdullah*, there were several persons present to observe what occurred. The district court found that this enforced the degrading aspects of the actions. The accused was also aware that the photos were intended to be shared publicly as war propaganda.¹⁷⁹ The appellate court held in *Saeed* that the starting point for how the accused’s actions shall be evaluated should be the context in which they were committed, and that it is not required that the victim experiences outrage. Photos and a film demonstrate that bodies had been mutilated and that other persons spit, kicked and poked on one of the bodies before the accused posed and let himself be photographed next to the same person. Also in this case, the purpose of taking photos was that they would be used in war propaganda.¹⁸⁰ The district court also took notice that the accused had expressed that fallen members of the own forces

¹⁷⁴ The parties, Bundesgerichtshof, 27 July 2017, para 3(b)(aa) in the English translation by Margaret Hiley and Ambos provided in Ambos, 2018, p. 1113.

¹⁷⁵ *Kunarac*, ICTY T. Ch. 22 February 2001, paras. 772 and 281; *Brdanin*, ICTY T. Ch., 1 September 2004, para. 1015; *Kvočka*, ICTY T. Ch., 2 November 2001, para. 172; *Akayesu*, ICTY T. Ch., 2 September 1998, paras. 688, 694 and 697.

¹⁷⁶ *Arklöv*, Stockholms tingsrätt, 18 December 2006, pp. 59-64; *Makitan*, Stockholms tingsrätt, 8 April 2011, pp. 68-69.

¹⁷⁷ *Katanga*, ICC P-T. Ch., 30 September 2018, paras. 375-376.

¹⁷⁸ *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 3.

¹⁷⁹ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 15.

¹⁸⁰ *Saeed*, Göta Hovrätt, 24 September 2019, p. 4.

would never be handled in the same manner,¹⁸¹ which is contrary to the principle of non-discrimination that applies to the protection of the dead.

Similarly, cases from other countries contain a context of multiple degrading acts directed against the dead.¹⁸² The German Federal Supreme Court found that a prior impaling of heads of dead persons and displaying them in front of a school constituted humiliating and degrading treatment that the accused thereafter had participated in by “having himself photographed several times in a pose conveying dominance and ruthlessness in direct proximity to the severed heads of the soldiers”. The Court found that the accused’s actions “doubtlessly constitutes gravely humiliating and degrading treatment of the killed soldiers”.¹⁸³ Finnish district courts have also considered posing in a degrading context as serious. In two cases concerning outrages upon the dead by posing for photos with dead persons the district courts found that the actions did not constitute a war crime of a lesser degree but of the normal degree.¹⁸⁴ Unlike many other jurisdictions, Finnish criminal law namely establishes liability not merely for war crimes of a normal degree and for gross crime but also for war crimes of a lesser degree (*lindrigt krigsbrott*).¹⁸⁵

The respective context was of clear importance for the Swedish courts’ findings that the accused had acted together and in collusion with others in subjecting the protected persons to degrading treatment. Further, cultural aspects were addressed in all three cases. Indeed, an expert opinion was provided by Mohammad Fazlhashemi, professor of Islamic theology and philosophy, who explained that placing a foot on a dead body would be considered a violation of dignity in Muslim culture and that desecration of corpses in armed conflicts is prohibited both among Sunni and Shia Muslims because it violates human dignity.¹⁸⁶ This supported that the subjective and objective elements were met since it can be concluded that an ordinary person in both the perpetrators’, the victim’s and the Swedish culture would consider a foot placed upon a dead body as an outrage. Placing one’s foot upon a body is thus understood as transculturally degrading.¹⁸⁷

In *Abdullah*, the accused had posed next to five dead or seriously wounded persons who had been placed in unnatural positions and laid on top of each other

¹⁸¹ Saeed TR, p. 13.

¹⁸² See e.g. *Jebbar-Salman*, Birkalands tingsrätt, 18 March 2016; *Hilal*, Centrala Tavastlands tingsrätt, 22 March 2016.

¹⁸³ The parties, Bundesgerichtshof, 27 July 2017, para 3(b)(bb) in *Ambos*, 2018, p. 1113.

¹⁸⁴ *Jebbar-Salman*, Birkalands tingsrätt, 18 March 2016; *Hilal*, Centrala Tavastlands tingsrätt, 22 March 2016.

¹⁸⁵ Chapter 11 section 7 Finnish Criminal Code. (11 kap. 7 § Strafflagen (19.12.1889/39): Om en krigsförbrytelse, med beaktande av dess följder eller andra omständigheter vid brottet, bedömd som en helhet är ringa, ska gärningsmannen för *lindrigt krigsförbrytelse* dömas till böter eller fängelse i högst två år.)

¹⁸⁶ *Abdulkareem*, Blekinge tingsrätt, 6 december 2016, pp. 10 and 15-16; *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 2; *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 4 (see also p. 4 of the prosecutor’s indictment attached to the judgment); *Saeed*, Örebro tingsrätt, 19 February 2019, p. 12-13.

¹⁸⁷ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 15; *Saeed*, Örebro tingsrätt, 19 February 2019, p. 13.

in a manner that the district court considered degrading, and the accused also placed his foot on the stomach of one of the persons while posing.¹⁸⁸ Based on a holistic evaluation, taking the context into account, the district court found that the accused had subjected the five protected persons to humiliating or degrading treatment calculated to seriously violate personal dignity, a serious violation of an IHL norm entailing liability under the crime against international law.¹⁸⁹ In *Abdulkareem*, the appellate court found that by posing for photos next to a head in a bowl and poking it with a tool, the accused had subjected the dead person to humiliating or degrading treatment that was calculated to seriously violate their personal dignity. The court made the same evaluation concerning the accused's active posing where he placed a weapon or a foot on the chest of one of the dead persons, where he pointed to one of the dead and partly unclothed bodies, and where another person placed a foot on a dead person's head. Also the accused's selfies which had dead persons in focus were considered as sufficiently degrading.¹⁹⁰ Whereas the district court had considered the selfies where the accused made a victory sign as manifestations of joy and victory which could not be considered as punishable,¹⁹¹ the appellate court found that the expressions of victory did not change the evaluation of his actions as humiliating and degrading.¹⁹² The appellate court held in (the appealed) *Saeed*, that the accused had on four occasions posed and let himself be photographed or filmed next to four dead or seriously wounded persons in total, of whom two were mutilated. It also appeared that he had at one time placed his foot on a body. These actions were considered in light of the context and the state of the mutilated bodies to constitute humiliating or degrading treatment that was calculated to seriously violate their personal dignity.¹⁹³ In comparison, *Abdulkareem* and *Abdullah* participated actively in front of the camera whereas *Saeed* was less active by merely posing and at one time placing his foot upon a protected person. In all three cases, the photo session was part of a number of interlinked acts that together was considered as 'treatment', and in which the accused participated together with others. None of the accused could have been unaware of the factual situation of the victims, which rendered the latter persons protected by IHL.

Common for *Abdulkareem*, *Abdullah* and *Saeed* is that they are largely based on evidence found on smart phones and social media. The accused were not charged with publishing the photos but this was raised as an aggravating circumstance.¹⁹⁴ As the prohibition of outrages upon personal dignity is linked to protection from public curiosity,¹⁹⁵ posing for and taking photos aimed at public circulation (e.g. war propaganda) should be considered as a serious

¹⁸⁸ *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 14-15.

¹⁸⁹ *ibid*, p. 14-15.

¹⁹⁰ *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 4.

¹⁹¹ *Abdulkareem*, Blekinge tingsrätt, 6 December 2016, p. 17.

¹⁹² *Abdulkareem*, Hovrätten över Skåne och Blekinge, 11 April 2017, p. 4.

¹⁹³ *Saeed*, Göta Hovrätt, 24 September 2019, p. 4-5.

¹⁹⁴ *Saeed*, Göta Hovrätt, 24 September 2019, p. 4.

¹⁹⁵ Sivakumaran, 2012, p. 263; *Maelzer*, US General Military Commission, 9-14 September 1946, in *Law Reports of Trials of War Criminals*, 1949, pp. 54-55.

violation. Outrages that are documented and shared on social media, as in the cases of *Abdulkareem*, *Abdullah* and *Saeed*, may result in prolonged suffering for the victim's family since such photos and videos will not disappear but may surface long after the act occurred. It may be argued that when the victim is identifiable, the family's rights and potential suffering should be taken into account under the subjective element, in light of their right under IHL to know the fate of their missing relatives and their rights under human rights law.¹⁹⁶

Neither international nor domestic cases referred to in this part establish that mere posing for photos/film with dead persons does in and of itself constitute degrading treatment. However, it follows that posing with dead persons shown in a degrading manner which is committed in a context of further degrading treatment, e.g. together and in collusion with others undertaking other degrading acts and expressing derogatory statements, would generally be considered as outrageous to the ordinary person thus meeting the severity requirement for criminal liability. In particular, if the photos/film are shared publicly with identifiable victims thus exposing persons whose dignity should be protected to public exposure.

5 Conclusion

It can be concluded that persons who have died for reasons related to a conflict are protected by IHL, in particular against outrages upon their dignity. As such, they are, as Swedish courts have found, protected persons for the purposes of section 4 para. 7 of the Act of 2014 and chapter 22 section 6 of the Criminal Code. The primary norm of this war crime, article 3 GC I-IV, is at the center of fostering respect for humane treatment and dignity in armed conflict. While mainly focused on protecting life and limb of living persons who are not or no longer taking part in hostilities, the part prohibiting outrages upon personal dignity also protect those who have died for reasons related to the conflict, including (but not limited to) fallen fighters. Read together with IHL's rules on the dead, this prohibition covers e.g. despoilment, mutilation, keeping body parts as souvenirs and degrading public exposure. If such treatment is of the severity that it would be considered as outrageous by the ordinary person, taking into account the victim's cultural background, this may entail individual criminal liability. The cases of *Abdulkareem* and *Abdullah* as well as cases decided by the German Federal Supreme Court and courts of other States demonstrate that posing for photos with dead persons constitute a criminal outrage upon personal dignity when committed in a context of further degrading treatment.

While it may appear that the domestic courts are breaking new ground in holding persons responsible for outrages against the dead that is captured on photos and shared on social media, it is not news that outrages against the personal dignity of the dead may be considered as war crimes; such findings are as old as modern ICL. What is new is that the domestic cases cover humiliating and degrading treatment that does not violate the bodily integrity of the dead but

¹⁹⁶ Article 32 AP I; rule 117 CIHL; *Akpinar and Altun v. Turkey*, ECtHR, 27 February 2007, para. 86; *Akum and others v. Turkey*, ECtHR, 24 March 2005, para. 259; *Genner v. Austria*, ECtHR, 12 January 2016, para. 35.

reflects a broader range of acts, akin to the range of examples covered by international case law on outrages against the living. This raises questions as to what acts, omissions and statements directed against the dead may bring about individual criminal liability. International case law provides some guidance but since there are few cases outlining what do not meet the severity threshold and few cases focusing on the dignity of the dead, this guidance is limited. Therefore, foreign case law provide complementary guidance, and substantive interplay between domestic courts may contribute to clarify issues of international law. The easy access to documentation of contemporary atrocities that photos and videos via smart phones and social media presents points to more similar cases coming before domestic courts. The forthcoming *Saeed* case before the Supreme Court thus present a timely opportunity to clarify in which circumstances posing for photos with persons who have died for reasons related to the conflict constitutes a war crime under the Act of 2014 but also to contribute to develop the understanding of the protection of dignity in ICL.

Bibliography

- Amnesty International, USA: *Human Dignity Denied: Torture and Accountability in the 'War on Terror'*, 27 October 2004, <<https://www.amnesty.org/download/Documents/92000/amr511452004en.pdf>>
- Asp, Petter, "Folkrätten och den svenska straffrätten", in Stern, Rebecca and Österdahl, Inger (eds.), *Folkrätten i svensk rätt*, Kina: Liber, 2012
- Bring, Ove and Träskman, Per Ole, "Folkrättens starka roll inom svensk straffrätt bör bestå – nu vill regeringen dumpa den", *Dagens Juridik*, 20 February 2014, <<http://www.dagensjuridik.se/2014/02/folkrattens-starka-roll>>
- Bring, Ove and Träskman, Per Ole, "Det är obegripligt att Justitiedepartementet kan påstå att systemskiftet sker med vårt goda minne", *Dagens Juridik*, 17 February 2014, <<http://www.dagensjuridik.se/2014/02/det-ar-obegripligt-att-justitiedepartementet>>
- Cameron, Ian, "Swedish International Criminal Law Rules & 'Gross Human Rights Offences'", in Asp, Petter (ed.), *Flores juris et legum – Festskrift till Nils Jareborg*, Uppsala: Iustus Förlag, 2002
- Cavendish, Julius, *US Apologises for 'Repugnant Actions of Soldiers in Afghanistan'*, *The Telegraph*, 21 March 2011, <<https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8395735/US-apologises-for-repugnant-actions-of-soldiers-in-Afghanistan.html>>
- Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge: Cambridge University Press, 2003
- Gihl, Torsten, *Angående begreppet 'folkrättsbrott'*, *Nordic Journal of International Law* 1952, vol. 22, no. 1
- Geneva Council for Rights and Liberties, *Egypt: Mutilation and Desecration of Corpses Constitute War Crimes*, 21 March 2020, <<http://genevacouncil.com/en/2020/03/21/egypt-mutilation-and-desecration-of-corpses-constitute-war-crimes/>>

- Graham, Marty, *US Navy Seal Spared Jail but Demoted after War Crimes Trial*, 3 July 2019, Reuters, <<https://www.reuters.com/article/us-usa-navyseal-warcrimes/u-s-navy-seal-spared-jail-but-demoted-after-war-crimes-trial-idUSKCN1TY1BJ>>
- Herre, Johnny, “Användningen av utländsk rätt i Högsta domstolen på det förmögenhetsrättsliga området”, in Udsen, Henrik et al., *Festskrift till Mads Bryde Andersen*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2018
- ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, Cambridge: Cambridge University Press, 2016, also available at <<https://ihl-databases.icrc.org/ihl/full/GCI-commentary>>
- ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd edition, 2020, <<https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>>
- ICRC, *Customary IHL Database*, <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>>
- ICRC, Doswald-Beck, Louise and Henckaerts, Jean-Marie, *Customary International Humanitarian Law: Vol. 1 Rules & Vol. 2 Practice*, Cambridge: Cambridge University Press, 2005
- ICRC, Sandoz, Yves, Swinarski, Christophe, and Zimmerman, Bruno (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: Marinus Nijhoff Publishers, 1987
- Klamberg, Mark, *Fråga om tillämpning av legalitetsprincipen beträffande Folkkrätsbrott*, Juridisk Tidskrift 2007-98, vol. 19, no. 1
- Kramer, Matthew H., *Do Animals and Dead People have Legal Rights?*, Canadian Journal of Law and Jurisprudence 2001, vol. 14, no. 1
- Levinson, Arlene, *Dead Soldier Dragged Through Somali Streets a Modern-Day Unknown*, Los Angeles Times, 16 January 1994, <<https://www.latimes.com/archives/la-xpm-1994-01-16-mn-12448-story.html>>
- McDermott, Jeremy, *FARC Rallies its Battered Troops*, BBC News, 2 March 2009, <<https://news.bbc.co.uk/2/hi/americas/7901470.stm>>
- Nowak, Manfred, “Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment” in Clapham, Andrew and Gaeta, Paola, (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014
- Petrig, Anna, *The War Dead and Their Gravesites*, International Review of the Red Cross 2009, vol.91, no. 874
- Schabas, William, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition, Oxford: Oxford University Press, 2016
- Simpson, Gerhard, *Internationell Straffrätt*, Svensk Juristtidning 1956, issue 1
- Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict*, Oxford: Oxford University Press, 2012
- Sjöholm, Maria, *Sexual Violence and Gender Based Crimes*, Scandinavian Studies in Law 2020, vol. 66
- Smolensky, Kirsten Rabe, *Rights of the Dead*, Hofstra Law Review 2003, vol. 37, issue 3

UN War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XIII, London: His Majesty's Stationary Office, 1949

Trials of War Criminals before the Nuernberg Military Tribunals, vol. V, Washington: United States Government Printing Office, 1950

Österdahl, Inger, "Folkrättsbrott i svenska domstolar: En våldsam utveckling", in Samuelsson Käätä, Jenny; Almkvist, Gustaf; Svensson, Erik and Skarhed, Anna (eds.), *Vänbok till Lena Holmqvist*, Uppsala: Iustus Förlag, 2019